

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BRIAN ZAHN,

Plaintiff,

v.

JOHN McHUGH,<sup>1</sup> Secretary of  
the Army,

Defendant.

NO. CV-03-0356-EFS

**ORDER DENYING PLAINTIFF'S FRCP  
RULE 60b MOTION TO VOID  
JUDGMENT**

Before the Court, without oral argument, is Plaintiff Brian Zahn's FRCP Rule 60b Motion to Void Judgment (ECF No. [256](#)). Mr. Zahn asks the Court to vacate and reverse the Ninth-Circuit-affirmed December 31, 2008 Judgment (ECF No. [231](#)). Defendant Dr. Francis J. Harvey opposes the motion. (ECF No. [259](#).) The Court carefully considered Mr. Zahn's pretrial motions, his trial claims and evidence, his post-trial motion, and this post-appeal motion. For the reasons set forth below, the Court finds Mr. Zahn fails to establish that relief is appropriate under Rule 60(b) and thus denies the motion.

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<sup>1</sup> John McHugh is substituted for his predecessor, Francis J. Harvey, as Secretary of the Army.

1 As to his first due-process argument, the Court finds Mr. Zahn fails  
2 to establish that his constitutional rights to liberty and property were  
3 taken without due process.<sup>2</sup>

4 Mr. Zahn's second argument is that the Court erroneously determined  
5 that he failed to assert an American with Disabilities Act (ADA) claim  
6 solely based on an inappropriate disclosure of medical information. The  
7 portion of the Complaint that Mr. Zahn cites in support of such an ADA  
8 claim is instead a claim under the ADA that he was constructively  
9 discharged because of a hostile work environment. This alleged claim  
10 was, in part, based on the alleged wrongful disclosure of Mr. Zahn's  
11 personal medical information: a claim the Court found was pled, but  
12 dismissed it because it was untimely and Mr. Zahn failed to demonstrate  
13 that he was disabled as defined by the ADA (ECF No. [80](#), pp. 20 & 31).<sup>3</sup>

14 This leads to Mr. Zahn's third ground for Rule 60(b) relief: that  
15 the Court erroneously required Mr. Zahn to prove "disability" as an  
16 element for an ADA hostile-work-environment claim. Mr. Zahn contends

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18 <sup>2</sup> Mr. Zahn contends the Ninth Circuit did not address his appellate  
19 argument that Defendants failed to provide due process. However, the  
20 Ninth Circuit addressed his due-process argument in its final broad  
21 ruling: "Zahn's remaining contentions are unpersuasive." (ECF No. [253](#),  
22 p. 4.)

23 <sup>3</sup> At trial, Plaintiff pursued retaliation claims based on an  
24 alleged wrongful disclosure of personal medical information under Title  
25 VII (42 U.S.C. § 2003e *et al.*), the ADA, the Rehabilitation Act (29  
26 U.S.C. § 794 *et al.*), and the Washington Law Against Discrimination (RCW  
49.60 *et al.*).

1 that his hostile-work-environment claim should not have been dismissed  
2 because the Ninth Circuit does not require "disability" as a necessary  
3 element. The Court disagrees. First, the Ninth Circuit has not  
4 determined whether a plaintiff may maintain a hostile-work-environment  
5 claim under the ADA. See *Brown v. City of Tucson*, 336 F.3d 1181, 1190  
6 (9th Cir. 2003) (declining to decide the issue). Accordingly, the Ninth  
7 Circuit has not articulated what elements a plaintiff must prove on a  
8 claim of disability-based hostile work environment. The Fourth and Fifth  
9 Circuits recognize a hostile-work-environment claim under the ADA, and  
10 both circuits specifically require the plaintiff to prove the hostile  
11 treatment was because of the disability. *Fox v. Gen. Motors Corp.*, 247  
12 F.3d 169, 175 (4th Cir. 2001); *Flowers v. S. Reg'l Physician Servs.,*  
13 *Inc.*, 247 F.3d 229, 232 (5th Cir. 2001). Further, in non-disability  
14 hostile-work-environment cases, the Ninth Circuit requires the plaintiff  
15 to establish that he was subjected to a hostile work environment *because*  
16 *of* the claimed protected status. *Manatt v. Bank of Am., NA*, 339 F.3d 792  
17 (9th Cir. 2003). Therefore, regardless of the untimeliness of Mr. Zahn's  
18 disability-based hostile-work-environment claim, the Court abides by its  
19 decision to dismiss his disability-based hostile-work-environment claim  
20 because Mr. Zahn failed to establish that he was "disabled."

21 Also, the Court abides by its ruling that Ed Reynolds' affidavit was  
22 inadmissible hearsay; this ruling was affirmed by the Ninth Circuit. (ECF  
23 No. [253](#).)

24 Finally, the Court finds no mistake, inadvertence, surprise, newly-  
25 discoverable evidence, or any other reason that justifies relief from the  
26 final (and affirmed) judgment under Rule 60(b).

1 For the reasons given above, **IT IS HEREBY ORDERED:** Plaintiff's FRCP  
2 Rule 60b Motion to Void Judgment (**ECF No. 256**) is **DENIED**.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
4 this Order and provide copies to Plaintiff and defense counsel.

5 **DATED** this 14th day of April 2011.

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7 s/Edward F. Shea  
8 EDWARD F. SHEA  
United States District Judge

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